EC-G-1999-078

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OSWER Directive 9835.5

OCT 6 1987

MEMORANDUM

SUBJECT: EPA Interim Guidance on Indemnification of Superfund Response Action Contractors Under Section 119 of SARA

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

C. Morgan Kinghorn, Acting Assistant Administrator
Office of Administration and Resources Management

TO: Regional Administrator, Regions I-X
Regional Counsel, Regions I-X
Director, Waste Management Division
Regions I, IV, V, VII, and VIII
Director, Emergency and Remedial Response Division
Region II
Director, Hazardous Waste Management Division
Region III and VI
Director, Toxics and Waste Management Division
Region IX
Director, Hazardous Waste Division
Region X
Director, Environmental Services Division
Regions I, VI, and VII

Purpose

Subject to certain restrictions, Section 119 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) authorizes the Environmental Protection Agency (EPA)[1] to provide indemnification[2] to response action contractors (RACs) working at Superfund sites for States, potentially responsible parties (PRPs), and EPA (including RACs working for the U.S. Army Corps).

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[1] Under Executive Order 12580, the President has also authorized other Federal agencies to indemnify RACs working for those agencies.

[2] "Indemnification" is an agreement whereby one party agrees to reimburse a second party for losses (in this case liability losses) suffered by the second party.

of Engineers at EPA-lead sites)[3]. The purpose of this memo is to describe how EPA may provide indemnification to RACs using Section 119 authority.

Background

Response action contractors have traditionally relied on commercial liability insurance or indemnification to sufficiently offset their potential liability risks from participation in the Superfund program. During the Superfund reauthorization debate, the RAC community identified several factors which, the RACs contended, impaired their ability to adequately offset risk. These factors included:

- Potential subjection to strict, joint and several liability under Superfund and under some state laws; and

- Inability of the commercial liability insurance market to provide liability insurance coverage to RACs involved in the Superfund cleanup program that is both adequate and affordable.

Prior to the reauthorization of CERCLA, EPA provided indemnification to RACs working for EPA through contract authority implementing CERCLA. EPA took this step in order to retain qualified contractors, given the absence of pollution liability insurance coverage. Under this old indemnification agreement, the Federal government indemnified RACs above an initial $1 million for third party liabilities and defense expenses. The indemnification agreement was void in cases of gross negligence or willful misconduct.

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[3] SARA Section 119(e)(2) defines "response action contractor" as:

a. any person who enters into a response action contract (which is defined in part as any written contract or agreement to provide any CERCLA removal or remedial action at a facility listed on the NPL, or to provide any ancillary services related to such response) with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such a contract; and

b. any person retained or hired by the person who enters into a response action contract, to provide any services related to a response action; and

c. any person, public or nonprofit private entity, conducting a field demonstration pursuant to SARA Section 311(b) (i.e., the "Alternative or Innovative Treatment Technology Research and Demonstration Program").

Section 119 of SARA responds to many of the concerns of the RAC community by:

- Establishing a standard of negligence for actions brought against RACs under Federal law;[4]
- Authorizing EPA to provide to RACs, on a discretionary basis, limited indemnification against pollution liability arising from RAC negligence; and
- Providing express statutory authority for indemnification and a funding mechanism.

The approach taken in Section 119 provisions is based on the following key points:

- A Federal liability standard of negligence, combined with RAC indemnification which is subject to limits and deductibles, provides adequate performance incentives for RACs working in the Superfund program;
- RAC indemnification provides an adequate substitute for insurance;
- Discretionary indemnification is an interim vehicle that will keep the Superfund program operative until the insurance industry returns to the RAC liability insurance market; and
- Discretionary indemnification does not create a Federally intrusive insurance program that interferes with private sector efforts to develop RAC liability insurance coverage.

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[4] The Federal standard of negligence under Section 119 applies only to Federal law. It does not preclude States from applying their own statutory law or common law liability standards, which may in some cases be strict liability. Response action contractors sued in Federal courts are under a "standard of care" defined by Federal law as negligence. However, if an action is brought under state law, a strict liability standard could apply.

EPA Task Force on RAC Indemnification

To avoid program delays, a Task Force was established to determine how EPA will provide indemnification to RACs working in the Superfund program. The Task Force is composed of representatives from EPA's Office of Waste Programs Enforcement (OWPE), Office of Emergency and Remedial Response (OERR), Office of Solid Waste (OSW), Office of General Counsel (OGC), Office of the Comptroller (OC), Office of Administration (OA), and the U.S. Army Corps of Engineers. The primary goals of the Task Force are to:

- Establish an EPA RAC indemnification program;
- Develop Section 119 RAC final indemnification guidelines and regulations;
- Ensure a forum for adequate public comment on RAC indemnification; and
- Promote private sector provision of RAC pollution liability insurance in the future by providing technical assistance to the insurance industry.

The Task Force will attempt to reach these goals by producing several work products that: (1) carefully analyze and estimate the potential pollution liability risk to which RACs are exposed by participating in the Superfund cleanup program; (2) determine what the final EPA indemnification terms and conditions will be; (3) prepare the Agency for implementing an interim RAC indemnification program; and (4) develop the Section 119 regulations.

Interim EPA Indemnification Guidelines

SARA Section 119 now provides EPA's sole authority to extend indemnification to RACs working in the Superfund program. Delegation of authority from the President authorizing EPA to use Section 119 provisions was issued through Executive Order 12580 on January 26, 1987. The delegation authorizes EPA to use Section 119 indemnification authority from the date of enactment (DOE) of SARA. Consequently, EPA must adhere to Section 119 provisions from SARA DOE (October 17, 1986).

Section 119(c)(7) requires that EPA promulgate regulations for carrying out indemnification provisions and, prior to promulgation of the regulations, develop guidelines to carry out use of Section 119 indemnification authority. Because of the complexity of the issues, EPA is proceeding deliberately in establishing these guidelines and is seeking substantial public

comment. Meanwhile, EPA is providing contractors with Section 119 coverage on an interim basis, using procedures outlined in this memorandum. Ultimately, this coverage will be amended to reflect guidance and regulations that will be developed in conformance with Section 119 requirements.

As further described in this memorandum, authorization to provide indemnification will be made by OSWER with concurrence from the Office of the Comptroller (OC). Authorization to indemnify will be made upon receipt of a recommendation from the Task Force. The OC will provide concurrence (or non-concurrence) with recommendations to indemnify within seven calendar days of receipt of a recommendation. Execution of indemnity agreements will be made by appropriate Agency administrative offices.

Section 119(c)(4) mandates that RACs must meet the following requirements before they can receive Federal indemnification for potential pollution liability associated with Superfund response action activities:

- The RAC must make diligent efforts to obtain insurance coverage from non-Federal sources to cover pollution liability; and

- In the case of a RAC contract covering more than one facility, the RAC agrees to continue to make such diligent efforts each time the RAC begins work under the contract at a new facility.

Section 119(c)(4) also requires that the following circumstances must exist before a RAC can receive Federal indemnification for potential pollution liability associated with Superfund response action activities:

- At the time the response action contract is entered into, insurance is not available, at a "fair and reasonable price", in sufficient quantity to offset potential RAC pollution liability risk; and

- Adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

In future guidance (i.e., the guidance which is to be published for public comment), EPA plans to include guidelines for determining whether insurance is "generally available" or is "fairly and reasonably priced". For the purpose of this interim guidance, EPA has determined, based on information currently available, that Superfund RACs are unable to obtain reasonably priced pollution liability insurance. Therefore, RACs are eligible to receive indemnification under Section 119 from DOE of

SARA. However, EPA will require that RACs seeking Federal indemnification meet the following requirements:

- Within 30 days of signing an indemnification agreement with EPA, RACs must submit to EPA (or to the appropriate State Contracting Officer) written documentation concerning the efforts they have made to date to secure pollution liability insurance coverage (e.g., a RAC could submit a written statement from an insurance broker stating that the RAC has attempted to secure pollution liability coverage from insurance carriers in the past six months).

- If the RAC has secured pollution liability coverage, it must submit to EPA (or to the State Contracting Officer) a copy of the policy and declaration page; and

- Every twelve months (or more frequently, if EPA determines that there has been a significant change in circumstances concerning the availability of pollution liability insurance) the RAC must submit to EPA (or to the State Contracting Officer) written documentation addressing the additional efforts the RAC has made to secure pollution liability insurance coverage including:

  - Copies of applications submitted to three known underwriters of pollution liability insurance;

  - If pollution liability coverage was denied by an underwriter, a summary of the reasons why such coverage was denied;

  - A status report of any pollution liability insurance obtained. The report would include: 1) type of coverage; 2) premium charged; 3) limits of coverage; 4) deductible levels, and any other major terms and conditions of the insurance coverage. A copy of the actual policy and declaration page could be provided in lieu of a written status report;

  - If pollution liability coverage was offered by an underwriter, but not accepted by the RAC, a report on the insurance offered (such as the "status report" required above), and a summary of the reasons why such coverage was not accepted; and

  - A status report concerning the alternative pollution liability risk transfer mechanisms the RAC has pursued other than commercial pollution liability insurance (e.g., risk retention groups, purchasing groups, association captives).

This information should be forwarded to the appropriate EPA official (or State Contracting Officer). This information will be reviewed by the Task Force as needed.

As required under the interim guidelines listed above, EPA expects RACs to demonstrate the extent to which they have attempted to secure pollution liability insurance coverage. EPA also expects that RACs will continue to monitor the market for pollution liability insurance, and continue to seek and secure such insurance coverage (however limited) from commercial insurance carriers or through alternative risk transfer mechanisms (e.g., self-insurance pools).

Indemnification of RACs Working for EPA

Pre-SARA indemnification terms will apply to work performed at a site after the date of enactment (DOE) of SARA if response work at the site was initiated under an EPA contract prior to the DOE of SARA.

EPA will enter into new indemnification agreements (See Attachment A), subject to Section 119 authority, with:

- RACs who are currently working under contract with EPA, for work they will initiate at a new site after DOE of SARA; and
- RACs receiving new contracts (or new cooperative agreements, in the case of Site Demonstration projects) with EPA after DOE of SARA for Superfund response action activities.

RACs currently under contract with EPA have been alerted to the changes that will be forthcoming to their indemnification agreements with EPA. EPA headquarters personnel in the Procurement and Contracts Management Division of the Office of Administration have been trained on the use of Section 119 and, with the assistance of the Task Force, will administer Section 119 indemnification interim procedures for EPA contractors. Requests for indemnification of EPA contractors will be subject to the approval of OSWER and concurrence of OC.

Indemnification of RACs Working for States

Section 119(c)(2) authorizes the indemnification of RACs working for States or political subdivisions of States (pursuant to a Section 104(d)(1) agreement with EPA) for new work initiated at Superfund sites from DOE of SARA. EPA may indemnify RACs performing response action activities for a State at a State-lead Superfund site after DOE of SARA. EPA will offer indemnification to RACs working for a State only if:

- The RAC's response action is part of new site work initiated at a Superfund site after DOE of SARA and it is related directly to cleanup of the site;
- RACs working for a State must meet all of the circumstances and issuance requirements set forth by Section 119(c)(4), as listed above; and
- RACs working for a State must meet all of EPA's interim guideline requirements, as listed previously on pages five and six.

EPA will not offer indemnification to RACs for site work they performed for States prior to DOE of SARA. Any EPA indemnification provided to a RAC(s) working for a State(s) will be subject to limits, deductibles, and other restrictions as required by Section 119(c)(5).

Until EPA issues final guidance and regulations, all requests for EPA indemnification of a RAC working for a State at a Superfund site will be processed via the Task Force. States should submit requests to both the Indemnification Task Force, c/o Director, Office of Emergency and Remedial Response (OERR), and to the Regional Superfund Branch Chief. Requests should identify the Regional Site Coordinator and State contact, and should include pertinent information regarding Section 119(c)(4) requirements as discussed previously. If the Task Force recommends approval of the indemnification request, the Office of the Comptroller will provide concurrence (or non-concurrence) within seven calendar days of receipt of the recommendation. Final approval for EPA indemnification of a State RAC will be made by the Director of the Office of Emergency and Remedial Response. If approval is authorized, then the Grants Administration Division will implement the approval through a special condition to be included in the State/EPA cooperative agreement (See Attachment A).

Indemnification of RACs working for Other Federal Agencies

Section 119(c)(2) authorizes the indemnification of RACs working for other Federal agencies at Superfund sites from DOE of SARA. A delegation of authority from the President authorizing other Federal Agencies to use Section 119 provisions was issued on January 26, 1987. Other Federal agencies follow all EPA guidance and regulations with respect to Section 119. Other Federal agencies that use Section 119 authority must provide their own source of funds (e.g.,their agency appropriation) to pay all indemnification costs (e.g., claims and legal defense costs).

At some Superfund sites, the U.S. Army Corps of Engineers manages response actions pursuant to an interagency agreement with EPA. For Section 119 indemnification purposes, any RAC working as a contractor for the Corps of Engineers at such sites (and where, for remedial actions, the site is listed on the NPL) is considered to be working for EPA rather than for some "other Federal agency". EPA will offer the same indemnification to contractors procured by the Corps of Engineers that it offers to contractors procured by EPA.

Indemnification of RACs Working for PRPs

Under Section 119(c)(2) authority, EPA can, in limited circumstances and subject to strict financial tests, indemnify RACs performing response action activities for PRPs subject to a consent order or decree at Superfund sites after DOE of SARA. EPA will use its authority to indemnify RACs working for PRPs only in extremely limited cases, e.g., where EPA indemnification of the PRP RAC is the solution of last resort. EPA will offer indemnification to RACs working for PRPs only if:

- The PRPs are unable to provide adequate indemnification, and as a result, are unable to obtain the services of a qualified RAC;
- The RAC's response action is part of new site work initiated at a Superfund site after DOE of SARA, and the action is related specifically to the cleanup of the site;
- RACs working for PRPs meet all of the issuance requirements set forth by Section 119(c)(4);
- The circumstances set forth in Section 119(c)(4) exist; and
- RACs working for PRPs meet all of EPA's interim guideline requirements.

EPA will not offer indemnification to RACs for work performed for PRPs prior to DOE of SARA, nor for any PRP RAC response activity that is not related specifically to a remedy at a Superfund site.

Further, Section 119(c)(5)(C) of SARA requires that, before EPA can enter into an indemnification agreement with a RAC performing work under contract with a PRP(s) at a Superfund site(s), EPA must determine the amount which the PRP(s) is able to indemnify the RAC. In making such a determination, EPA shall take into account the total net assets and resources of the PRP(s) with respect to the facility at the time of such determinations. If EPA determines that the amount which the PRP(s) is able to indemnify the RAC is inadequate, then EPA may enter into an indemnification agreement with the RAC to meet the anticipated shortfall. EPA will consider the combined capabilities of all the PRPs at a site to determine whether, as a group, they are capable of providing adequate coverage. In general, the Agency expects to use this provision only in cases where PRPs are small firms with few assets. Therefore, Regions should not make requests for Federal indemnification where PRPs are large corporations with substantial assets or where the PRPs, as a group, have substantial assets. As a result, EPA does not expect requests for Federal indemnification to become an integral part of settlement negotiations.

EPA plans to provide additional guidance in the future concerning the determinations that need to be made as a prerequisite to indemnifying RACs working for PRPs (such as defining "net assets and resources" of the PRPs, and whether the PRPs are "unable to provide adequate indemnification"). Until EPA distributes this guidance, all such determinations will be made by the Task Force.

EPA indemnification of a RAC working for a PRP is a measure of last resort. If EPA does provide indemnification in these cases, the consent decree (or order) should specify terms and conditions, using the model EPA indemnification agreement for RACs working for PRPs shown in Attachment A. If EPA enters into an indemnification agreement with a RAC working for a PRP(s), the RAC must:

- Retain financial responsibility for a deductible amount if commercial pollution liability insurance is unavailable or unreasonably priced; and

- Exhaust all administrative, judicial, and common law claims for indemnification against all PRPs participating in the cleanup of the facility before EPA can pay a claim.

If a RAC has received partial indemnification from a PRP(s), EPA may also provide indemnification in cases where the PRP indemnification is deemed insufficient, and in mixed funding cases. EPA may provide indemnification above the PRP indemnification. The consent decree should specify the terms and conditions using the model EPA indemnification agreement shown in Attachment A.

All requests for EPA indemnification of a RAC working for a PRP(s) at a Superfund site should be submitted to both the Indemnification Task Force, c/o Director, Office of Waste Programs Enforcement (OWPE), and to the Regional Superfund Enforcement Branch Chief. Please identify the Regional Site Coordinator and the Regional Counsel's Site Representative. Include pertinent information regarding the number of PRPs, financial profile of the PRPs, type of work to be performed, etc., such that the Task Force can make determinations per Section 119(c)(4) and Section 119(c)(5).

Upon determining that a RAC meets all of the circumstances and requirements set forth in Section 119 and in EPA interim guidelines, the Task Force will evaluate an amount to which the PRP(s) is able to indemnify the RAC and an amount to which EPA will indemnify the RAC in excess of the PRP indemnification amount. Any EPA indemnification provided to a RAC(s) working for PRP(s) will be subject to limits, deductibles, and other limitations as required by Section 119(c)(5). If the Task Force recommends approval of the indemnification request, the Office of the Comptroller will provide concurrence (or non-concurrence) within seven calendar days of receipt of the recommendation. Final approval for EPA indemnification of a PRP RAC will be made by the Director of OWPE.

RACS Working for PRPs Without EPA Indemnification

Those RACs working for PRPs at Superfund sites who do not receive indemnification from EPA may either receive no indemnification at all, or may receive indemnification from PRPs only. For those RACs working with no indemnification, PRPs should demonstrate that the RAC is qualified to perform the work adequately, has sufficient financial capability to complete the projected work, and demonstrates financial responsibility for potential third party liability costs. This can be ensured through a combination of adequate competition in the contract procurement process and a demonstration of financial responsibility. Such a demonstration can consist of purchase of performance bonds, letters of credit, insurance, maintenance of a trust fund, etc. A consent decree should specify the aforementioned.

For those RACs receiving indemnification from PRPs only (and where EPA deems the indemnification to be adequate), RACs should be qualified to perform work adequately. This can be ensured through a combination of adequate competition in the contract procurement process, and through a demonstration of financial responsibility. The PRP indemnification is sufficient demonstration of financial responsibility; therefore, performance bonds, letters of credit, etc., are not required. The consent decree should specify the aforementioned as well as the indemnification terms and conditions.

Publicly Owned Treatment Works

Section 119(c)(5)(D) specifically prohibits EPA from indemnifying an owner or operator of a facility regulated under the Solid Waste Disposal Act. Therefore, publicly owned treatment works subject to permit-by-rule provisions cannot be indemnified (nor can any other permit-by-rule facility, such as an underground injection facility). The intent of this provision is to prohibit EPA from offering indemnification to off-site treaters or disposers of Superfund hazardous waste. Therefore, while POTWs not subject to RCRA regulation (i.e., POTWs without a permit-by-rule) are not explicitly prohibited from EPA indemnification authority under Section 119, the Agency has determined that an extension of indemnification authority to any POTW would not be consistent with Congressional intent in Section 119. Therefore, EPA will not provide indemnification to POTWs under Section 119 authority.

Summary

This memorandum describes the current Federal indemnification provisions for response action contractors working in the Superfund program as provided in Section 119 of SARA. The statute gives the Federal government the discretionary authority to indemnify RACs for liability arising out of negligence. Acts of gross negligence and willful misconduct are expressly excluded from the indemnity provision. The Section 119 indemnity provision does not preempt the rights of States to enforce a standard of strict liability.

Federal indemnification is meant to be an interim vehicle which will keep the Superfund program operative until the insurance industry returns to the market. It is not intended to create a Federally intrusive program that will interfere with private sector efforts to develop RAC liability insurance coverage.

Please direct all questions and comments to Robert Mason at FTS 382-4015 or Tom Gillis at FTS 382-4524

Attachments
A. Model Indemnification Agreements
B. CERCLA (as amended) Section 119

cc: Administrator
Deputy Administrator
General Counsel
Regional Grants Office, Regions I-X
Regional Financial Management Office, Regions I-X
Regional Superfund Branch Chiefs, Regions I-X

Attachment A

MODEL INDEMNIFICATION AGREEMENTS

This attachment contains model EPA indemnification agreements for use by EPA, States, and PRPs when RACs seek indemnification from EPA. Any deviation from the model language must be approved by the EPA Indemnification Task Force. Four models are attached:

I. Model EPA/RAC Indemnification Agreement
II. Model State Cooperative Agreement Indemnification Special Condition
III. Model EPA/RAC Indemnification Agreement for RACs under Contract with PRPs
IV. Model EPA/ SITES Program Technology Vendor Indemnification Agreement

I

MODEL EPA/RAC INDEMNIFICATION AGREEMENT

H. Insurance -- Liability to Third Persons -- Commercial Organizations (EPAAR 1552.228-70) (APR 1984) (with deviation)

(a) This Clause H_____ will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA).

(b) The Contractor shall procure and maintain such insurance as is required by law or regulation, including that required by FAR Part 28, in effect as of the date of execution of this contract, and any such insurance as the Contracting officer may, from time to time, require with respect to performance of this contract.

(c) At a minimum, the Contractor shall procure and maintain the following types of insurance.

(1) Workmen's compensation and occupational disease insurance in amounts to satisfy State law;

(2) Employer's liability insurance in the minimum amount of $100,000 per occurrence;

(3) Comprehensive general liability insurance for bodily injury, death or loss of or damage to property of third persons in the minimum amount of $1,000,000 per occurrence;

(4) When vessels are used in the performance of the contract, vessel collision liability and indemnity liability insurance in such amounts as the Contracting Officer may require or approve: provided, that the Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program. All insurance required pursuant to the provisions of this paragraph shall be in such form and for such periods of time as the Contracting Officer may, from time to time, require or approve and with insurers approved by the Contracting Officer.

(d) The Contractor further agrees that it will make diligent efforts throughout contract performance in accordance with EPA guidelines to obtain adequate pollution liability insurance.

(e) The Contractor agrees, to the extent and in the manner required by the Contracting Officer, to submit for the approval of the Contracting Officer all insurance maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement hereunder. The

Contractor's submission shall include documentation demonstrating its diligent efforts to obtain pollution liability insurance.

(f) The Contractor shall be reimbursed, for the portion allocable to this contract, the reasonable cost of insurance (including reserves for self-insurance) as required or approved pursuant to the provisions of this contract clause.

(g)(1) Pursuant to Section 119 of CERCLA, the EPA will hold harmless and indemnify the Contractor against any liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying out response action activities. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance will not be covered under this contract clause H _____.

(2) For purposes of this clause (g), if the Contracting Officer has determined that the insurance identified in paragraph (d) is not available at a reasonable cost, the Government will hold harmless and indemnify the Contractor for liability to the extent such liability exceeds $100,000.00.

(3) The Contractor shall not be reimbursed for liabilities as defined in (g) (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(h) The Government may discharge its liability under this contract clause by making payments directly to the Contractor or directly to parties to whom the Contractor may be liable.

(i) With prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this contract clause shall provide for prompt notification to the

Contractor which is covered by this contract clause, and shall entitle the Government, at its election, to control, or assist in the settlement or defense of any such claim or action. The Government will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The Government may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(j) If insurance coverage required or approved by the Contracting Officer is reduced without the Contracting Officer's approval, the liability of the Government under this contract clause will not be increased by reason of such reduction.

(k) The Contractor shall:

(1) Promptly notify the Contracting Officer of any claim or action against the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this contract clause;

(2) Furnish evidence or proof of any claim covered by this contract clause in the manner and form required by the Government; and

(3) Immediately furnish the Government copies of all pertinent papers received by the Contractor. The Government may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the Government's directions, and execute any authorizations required in regard to such settlement or defense.

(l) Reimbursement for any liabilities under this contract clause will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgments or by settlements approved in writing by the Government.

II

MODEL STATE COOPERATIVE AGREEMENT

INDEMNIFICATION SPECIAL CONDITION

EPA INDEMNIFICATION

EPA will provide indemnification pursuant to Section 119 of CERCLA, as amended, to contractors carrying out response actions under this agreement provided that the State certifies to EPA that:

1. The contracts awarded under this agreement are defined in section 119(e) of CERCLA, as amended;

2. The contracts awarded under this agreement include the following clause that exclusively governs EPA indemnification:

   (see attached clause)

3. At the end of each calendar year and at the end of each project period, all statements and materials related to pollution liability insurance submitted by the Contractors to the State Contracting Officer will be transferred to EPA.

Attachment

(1) Pursuant to Section 119 of CERCLA, the EPA will hold harmless and indemnify the Contractor against any third party liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying out response action activities. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance required by this contract will not be covered by this clause. This Clause will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 (CERCLA).

(A) The Contractor shall submit to the State Contracting Officer within 30 days of award a written statement from an insurance broker stating that the Contractor has attempted to secure pollution liability coverage from insurance carriers in the past six months;

(B) If the Contractor has secured pollution liability coverage, it must submit a copy of the policy and declaration page to the State Contracting Officer; and

(C) Every twelve months, or as directed by the EPA, the Contractor shall submit to the State Contracting Officer written documentation of the additional efforts made by the contractor to secure pollution liability insurance coverage, including:

- Copies of applications to three known underwriters of pollution liability insurance;
- A status report of any pollution liability insurance obtained, to include type of coverage, premium charged, limits of coverage, deductibles and major terms and conditions of coverage (e.g., a copy of the actual declaration page could be provided in lieu of a status report);
- If pollution liability coverage was offered by an underwriter, but not accepted by the RAC, a report on the insurance offered (such as the "status report" required above), and a summary of the reasons why such coverage was not accepted;
- If pollution liability coverage was rejected by the underwriter, a summary of the reasons why such coverage was denied; and

- A status report on what alternative pollution liability risk transfer mechanisms the contractor has pursued other than commercial pollution liability insurance (e.g., captives, letters of credit, group purchasing of insurance, etc.).

(2) For purposes of this clause, the EPA will hold harmless and indemnify the Contractor for liability described herein to the extent such liability exceeds $100,000.00.

(3) The Contractor shall not be reimbursed for liabilities as defined herein (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(4) The EPA may discharge its liability under this contract clause by making payments directly to the Contractor or directly to parties to whom the Contractor may be liable.

(5) With prior written approval of the State Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this contract clause shall provide for prompt notification to the Contractor which is covered by this contract clause, and shall entitle the EPA, at its election, to control, or assist in the settlement or defense of any such claim or action. The EPA will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The EPA may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(6) If insurance coverage required or approved by the State Contracting Officer is reduced without the State Contracting Officer's approval, the liability of the EPA under this contract clause will not be increased by reason of such reduction.

(7) The Contractor shall:

- Promptly notify the Assistant Administrator, OSWER, EPA of any claim or action against the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this contract clause.

- Furnish evidence or proof of any claim covered by this contract clause in the manner and form required by the EPA.

- Immediately furnish the EPA copies of all pertinent papers received by the Contractor. The EPA may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the EPA's directions, and execute any authorizations required in regard to such settlement or defense.

- Submit any disagreements concerning EPA indemnification to the Assistant Administrator, OSWER, EPA for resolution. Decision by the Assistant Administrator will constitute final Agency action.

(8) Reimbursement for any liabilities under this contract clause is available exclusively from the EPA and will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgement or by settlements approved in writing by the EPA.

(9) Nothing in this clause shall be construed as an indemnification agreement between the State and the Contractor.

(10) Nothing in this contract shall be construed to create, either expressly or by implication, any contractual relationship between EPA and the Contractor except as specifically provided in this clause. EPA is not authorized to represent or act on behalf of the State in any manner relating to this contract and has no responsibility with regard to the mutual obligations of the State and the Contractor as provided herein.

III

MODEL EPA/RAC INDEMNIFICATION AGREEMENT FOR RACS UNDER CONTRACT WITH PRPS

MODEL CLAUSES FOR PRP CONTRACTS

Sec. _____ Pollution Liability Insurance and Contractor Indemnification

A. Pollution Liability Insurance

(1) The Contractor shall obtain such pollution liability insurance (hereinafter insurance) as the EPA determines is available at a fair and reasonable price at the time of contract award. The cost of such insurance is an allowable contract cost.

(2) The Contractor shall report to EPA on its efforts to obtain pollution liability insurance.

(A) Within 30 days of signing this agreement, the Contractor shall submit to the EPA a written statement from an insurance broker stating that the Contractor has attempted to secure pollution liability coverage from insurance carriers in the past six months;

(B) If the Contractor has secured pollution liability coverage, it must submit a copy of the policy and declaration page to EPA; and

(C) Every twelve months, or as directed by the EPA, the Contractor shall submit to the EPA written documentation of the additional efforts made by the contractor to secure pollution liability insurance coverage including:

- Copies of applications to three known underwriters of pollution liability insurance;
- A status report of any pollution liability insurance obtained, to include type of coverage, premium charged, limits of coverage, deductibles and major terms and conditions of coverage (e.g., a copy of the actual declaration page could be provided in lieu of a status report);
- If pollution liability coverage was offered by an underwriter, but not accepted by the RAC, a report on the insurance offered (such as the "status report" required above), and a summary of the reasons why such coverage was not accepted;
- If pollution liability coverage was rejected by the underwriter, a summary of the reasons why such coverage was denied; and

- A status report on what alternative pollution liability risk transfer mechanisms the contractor has pursued other than commercial pollution liability insurance (e.g., captives, letters of credit, group purchasing of insurance, etc.).

(3) If, during the period of this contract, EPA determines that insurance or additional insurance is available, the contractor shall obtain such insurance.

B. PRP Indemnification

[The following are minimum clauses. PRPs may include additional, non-conflicting terms.]

(1) The PRPs will hold harmless and indemnify the Contractor against any third party liability (including the expense of litigation or settlement) for negligence arising out of the Contractor's performance of this contract in carrying out response action activities. Such indemnification shall apply only to liability which results from a release of a hazardous substance, pollutant, or contaminant if such release arises out of the response action activities in this contract. Indemnification under this paragraph will apply only to liability not compensated by insurance, not within the deductible amounts of the Contractor's insurance in paragraph A, above, nor within the deductible in paragraph D, below. Indemnification provided under this paragraph shall not exceed $_____ (amount determined by EPA).

(2) Any liability subject to indemnification shall be presented first under this paragraph.

(3) The PRPs are individually and collectively responsible for the indemnification under this paragraph, unless otherwise specifically provided within.

(4) If the PRPs fail to satisfy the indemnification claim within 60 days of its presentation, the Contractor will notify the EPA of such failure.

C. EPA Indemnification

(1) Pursuant to Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), the EPA will hold harmless and indemnify the Contractor against any third party liability (including the expenses of litigation or settlement) for negligence arising out of the Contractor's performance under this contract in carrying

out response action activities. Such indemnification shall apply only to liability not compensated by insurance, indemnification provided in accordance with paragraph B, above, or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this contract. Further, any liability within the deductible amounts of the Contractor's insurance in paragraph A, above, or the deductible in paragraph D, below, will not be covered by this paragraph.

(2) This paragraph will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of CERCLA.

(3) The Contractor shall not be reimbursed for liabilities as defined herein (including the expenses of litigation or settlement) that were caused by the conduct of the Contractor (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Contractor shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(4) The EPA may discharge its liability under this contract paragraph by making payments directly to the Contractor or directly to parties to whom the Contractor may be liable.

(5) With prior written approval of the EPA, the Contractor may include in any subcontract under this contract the same provisions in this clause whereby the Contractor shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice, furnishings of evidence or proof, and the like, between the Contractor and the subcontractor as are established by this paragraph. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this paragraph shall provide for prompt notification to the Contractor which is covered by this paragraph, and shall entitle the EPA, at its election, to control, or assist in the settlement or defense of any such claim or action. The EPA will indemnify the Contractor with respect to his obligation to subcontractors under such subcontract provisions. The EPA may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(6) If insurance coverage required in paragraph A, above, is reduced without the EPA's approval, the liability of the EPA

under this paragraph will not be increased by reason of such reduction.

(7) The Contractor shall:

- Promptly notify the Assistant Administrator, OSWER, EPA of any claim or action against the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this paragraph.

- Furnish evidence or proof of any claim covered by this paragraph in the manner and form required by the EPA.

- Immediately furnish the EPA copies of all pertinent papers received by the Contractor. The EPA may direct, control, or assist the settlement or defense of any such claim or action. The Contractor shall comply with the EPA's directions, and execute any authorizations required in regard to such settlement or defense.

- Submit any disagreements concerning EPA indemnification to the Assistant Administrator, OSWER, EPA for resolution. Decision by the Assistant Administrator will constitute final Agency action.

(8) The Contractor may present a claim for indemnification under this paragraph only after compliance with the provisions in paragraphs B, above, and C, below.

(9) If the PRPs fail to indemnify the Contractor in the amount provided in paragraph B, above, no indemnification for that amount will be paid under this paragraph until the Contractor demonstrates to EPA's satisfaction that it has exhausted all administrative and judicial claims for indemnification under paragraph B, above, and any common law claims for indemnification that it has against the PRPs. Evidence of exhaustion of claims may include a judicial order dismissing the Contractor's claims, documentation of the Contractor's unsuccessful efforts to enforce a judgement against the PRPs, or documentation of the Contractor's unsuccessful claims in a bankruptcy proceeding involving the PRPs.

(10) Reimbursement for any liabilities under this paragraph will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgement or by settlements approved in writing by the EPA.

(11) Nothing in this contract shall be construed to create, either expressly or by implication, any contractual relationship between EPA and the Contractor except as specifically provided in this section. EPA is not authorized to represent or act on behalf of the (PRPs) in any manner relating to this contract and has no responsibility with regard to the mutual obligations of the (PRPs) and the Contractor as provided herein.

D. Contractor Deductible

The Contractor shall pay the first $100,000.00 of any liability subject to indemnification under this contract before seeking indemnification under paragraphs B and C, above.

IV

MODEL EPA/ SITES PROGRAM TECHNOLOGY VENDOR INDEMNIFICATION AGREEMENT

EPA Indemnification

(1) Pursuant to Section 119 of CERCLA, the EPA will hold harmless and indemnify the Recipient against any liability (including the expenses of litigation or settlement) for negligence arising out of the Recipient's performance under this cooperative agreement in carrying out response action activities through the Superfund Innovative Technology Evaluation program under Section 311(b) of CERCLA. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of the response action activities of this cooperative agreement. Further, any liability within the deductible amounts of the Recipient's insurance will not be covered under this clause. If the recipient has secured pollution liability coverage, it must submit a copy of the policy and the declaration page to EPA.

(2) Every twelve months, or as directed by the EPA, the Recipient shall submit to the Contracting Officer written documentation of the additional efforts made by the recipient to secure pollution liability insurance coverage, including:

- Copies of applications to three known underwriters of pollution liability insurance;
- A status report of any pollution liability insurance obtained, to include type of coverage, premium charged, limits of coverage, deductibles and major terms and conditions of coverage (e.g., a copy of the actual declaration page could be provided in lieu of a status report);
- If pollution liability coverage was rejected by the underwriter, a summary of the reasons why such coverage was denied; and

(3) For purposes of this clause, the Government will hold harmless and indemnify the Recipient for liability to the extent such liability exceeds $100,000.00.

(4) The Recipient shall not be reimbursed for liabilities as defined herein (including the expenses of litigation or settlement) that were caused by the conduct of the Recipient (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent, constituted intentional misconduct, or demonstrated a lack of good faith. Further, the Recipient shall not be indemnified for liability arising under strict tort liability, or any other basis of liability other than negligence.

(5) The Government may discharge its liability under this cooperative agreement clause by making payments directly to the Recipient or directly to parties to whom the Recipient may be liable.

(6) With prior written approval of the Contracting Officer, the Recipient may include in any subcontract under this cooperative agreement the same provisions in this clause whereby the Recipient shall indemnify the subcontractor. Such a subcontract shall provide the same rights and duties and the same provisions for notice between the Recipient and the subcontractor as are established by this clause. Similar indemnification may be provided for subcontractors at any time upon the same terms and conditions. Subcontracts providing for indemnification within the purview of this cooperative agreement clause shall provide for prompt notification to the Recipient which is covered by this cooperative agreement clause, and shall entitle the Government, at its election, to control, or assist in the settlement or defense of any such claim or action. The Government will indemnify the Recipient with respect to his obligation to subcontractors under such subcontract provisions. The Government may discharge its obligations under this paragraph by making payments directly to subcontractors or to parties to whom the subcontractors may be liable.

(7) If insurance coverage required or approved by the Contracting Officer is reduced without the Contracting Officer's approval, the liability of the Government under this cooperative agreement clause will not be increased by reason of such reduction.

(8) The Recipient shall:

(a) Promptly notify the Assistant Administrator, OSWER, EPA of any claim or action against the Recipient or any subcontractor which reasonably may be expected to involve indemnification under this cooperative agreement clause;

(b) Furnish evidence or proof of any claim covered by this cooperative agreement clause in the manner and form required by the Government;

(c) Immediately furnish the Government copies of all pertinent papers received by the Recipient. The Government may direct, control, or assist the settlement or defense of any such claim or action. The Recipient shall comply with the Government's directions, and execute any authorizations required in regard to such settlement or defense; and

(d) Submit any disagreements concerning EPA indemnification to the Assistant Administrator, OSWER, EPA for resolution.

Decision by the Assistant Administrator will constitute final Agency action.

(9) Reimbursement for any liabilities under this cooperative agreement clause will not exceed appropriations available from CERCLA's Hazardous Substance Superfund (except to the extent that Congress may make appropriations to specifically fund any deficiencies) at the time such liabilities are represented by final judgement or by settlements approved in writing by the Government.

(10) This Clause will be modified by the mutual agreement of the parties hereto within 180 days of the EPA's promulgation of final guidelines for carrying out the provisions of Section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA).

ATTACHMENT B

CERCLA (AS AMENDED)

SECTION 119

high priority to facilities where the release of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

SEC. 119. RESPONSE ACTION CONTRACTORS.

(a) LIABILITY OF RESPONSE ACTION CONTRACTORS.—

(1) RESPONSE ACTION CONTRACTORS.—A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this title or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.

(2) NEGLIGENCE, ETC.—Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct.

(3) EFFECT ON WARRANTIES; EMPLOYER LIABILITY.—Nothing in this subsection shall affect the liability of any person under any warranty under Federal, State, or common law. Nothing in this subsection shall affect the liability of an employer who is a response action contractor to any employee of such employer under any provision of law, including any provision of any law relating to worker's compensation.

(4) GOVERNMENTAL EMPLOYEES.—A state employee or an employee of a political subdivision who provides services relating to response action while acting within the scope of his authority as a governmental employee shall have the same exemption from liability (subject to the other provisions of this section) as is provided to the response action contractor under this section.

(b) SAVINGS PROVISIONS.—

(1) LIABILITY OF OTHER PERSONS.—The defense provided by section 107(b)(3) shall not be available to any potentially responsible party with respect to any costs or damages caused by any act or omission of a response action contractor. Except as provided in subsection (a)(4) and the preceding sentence, nothing in this section shall affect the liability under this Act or under any other Federal or State law of any person, other than a response action contractor.

(2) BURDEN OF PLAINTIFF.—Nothing in this section shall affect the plaintiff's burden of establishing liability under this title.

(c) INDEMNIFICATION.—

(1) IN GENERAL.—The President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability (including the expenses of litigation or settlement) for negligence arising out of the contractor's performance in carrying out response action activities under this title, unless such liability was

caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct.

(2) APPLICABILITY.—This subsection shall apply only with respect to a response action carried out under written agreement with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this title; or

(D) any potentially responsible party carrying out any agreement under section 122 (relating to settlements) or section 106 (relating to abatement).

(3) SOURCE OF FUNDING.—This subsection shall not be subject to section 1301 or 1341 of title 31 of the United States Code or section 3732 of the Revised Statutes (41 U.S.C. 11) or to section 3 of the Superfund Amendments and Reauthorization Act of 1986. For purposes of section 111, amounts expended pursuant to this subsection for indemnification of any response action contractor (except with respect to federally owned or operated facilities) shall be considered governmental response costs incurred pursuant to section 104. If sufficient funds are unavailable in the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 to make payments pursuant to such indemnification or if the Fund is repealed, there are authorized to be appropriated such amounts as may be necessary to make such payments.

(4) REQUIREMENTS.—An indemnification agreement may be provided under this subsection only if the President determines that each of the following requirements are met:

(A) The liability covered by the indemnification agreement exceeds or is not covered by insurance available, at a fair and reasonable price, to the contractor at the time the contractor enters into the contract to provide response action, and adequate insurance to cover such liability is not generally available at the time the response action contract is entered into.

(B) The response action contractor has made diligent efforts to obtain insurance coverage from non-Federal sources to cover such liability.

(C) In the case of a response action contract covering more than one facility, the response action contractor agrees to continue to make such diligent efforts each time the contractor begins work under the contract at a new facility.

(5) LIMITATIONS.—

(A) LIABILITY COVERED.—Indemnification under this subsection shall apply only to response action contractor liability which results from a release of any hazardous substance or pollutant or contaminant if such release arises out of response action activities.

(B) DEDUCTIBLES AND LIMITS.—An indemnification agreement under this subsection shall include deductibles and shall place limits on the amount of indemnification to be made available.

(C) CONTRACTS WITH POTENTIALLY RESPONSIBLE PARTIES.—

(i) DECISION TO INDEMNIFY.—In deciding whether to enter into an indemnification agreement with a response action contractor carrying out a written contract or agreement with any potentially responsible party, the President shall determine an amount which the potentially responsible party is able to indemnify the contractor. The President may enter into such an indemnification agreement only if the President determines that such amount of indemnification is inadequate to cover any reasonable potential liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. The President shall make the determinations in the preceding sentences (with respect to the amount and the adequacy of the amount) taking into account the total net assets and resources of potentially responsible parties with respect to the facility at the time of such determinations.

(ii) CONDITIONS.—The President may pay a claim under an indemnification agreement referred to in clause (i) for the amount determined under clause (i) only if the contractor has exhausted all administrative, judicial, and common law claims for indemnification against all potentially responsible parties participating in the clean-up of the facility with respect to the liability of the contractor arising out of the contractor's negligence in performing the contract or agreement with such party. Such indemnification agreement shall require such contractor to pay any deductible established under subparagraph (B) before the contractor may recover any amount from the potentially responsible party or under the indemnification agreement.

(D) RCRA FACILITIES.—No owner or operator of a facility regulated under the Solid Waste Disposal Act may be indemnified under this subsection with respect to such facility.

(E) PERSONS RETAINED OR HIRED.—A person retained or hired by a person described in subsection (e)(2)(B) shall be eligible for indemnification under this subsection only if the President specifically approves of the retaining or hiring of such person.

(6) COST RECOVERY.—For purposes of section 107, amounts expended pursuant to this subsection for indemnification of any person who is a response action contractor with respect to any release or threatened release shall be considered a cost of response incurred by the United States Government with respect to such release.

(7) REGULATIONS.—The President shall promulgate regulations for carrying out the provisions of this subsection. Before promulgation of the regulations, the President shall develop guidelines to carry out this section. Development of such guidelines shall include reasonable opportunity for public comment.

(8) STUDY.—The Comptroller General shall conduct a study in the fiscal year ending September 30, 1989, on the application of this subsection, including whether indemnification agreements under this subsection are being used, the number of claims that have been filed under such agreements, and the need for this subsection. The Comptroller General shall report the findings of the study to Congress no later than September 30, 1989.

(d) EXCEPTION.—The exemption provided under subsection (a) and the authority of the President to offer indemnification under subsection (c) shall not apply to any person covered by the provisions of paragraph (1), (2), (3), or (4) of section 107(a) with respect to a release or threatened release concerned if such person would be covered by such provisions even if such person had not carried out any actions referred to in subsection (e) of this section.

(e) DEFINITIONS.—For purposes of this section—

(1) RESPONSE ACTION CONTRACT.—The term "response action contract" means any written contract or agreement entered into by a response action contractor (as defined in paragraph (2)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this Act; or

(D) any potentially responsible party carrying out an agreement under section 106 or 122;

to provide any remedial action under this Act at a facility listed on the National Priorities List, or any removal under this Act, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility.

(2) RESPONSE ACTION CONTRACTOR.—The term "response action contractor" means—

(A) any—

(i) person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such contract; and

(ii) person, public or nonprofit private entity, conducting a field demonstration pursuant to section 311(b); and

(B) any person who is retained or hired by a person described in subparagraph (A) to provide any services relating to a response action.

(3) INSURANCE.—The term "insurance" means liability insurance which is fair and reasonably priced, as determined by the President, and which is made available at the time the contractor enters into the response action contract to provide response action.

(f) COMPETITION.—Response action contractors and subcontractors for program management, construction management, architectural and engineering, surveying and mapping and relat[illegible]

be selected in accordance with title IX of the Federal Property and Administrative Services Act of 1949. The Federal selection procedures shall apply to appropriate contracts negotiated by all Federal governmental agencies involved in carrying out this Act. Such procedures shall be followed by response action contractors and subcontractors.

SEC. 120. FEDERAL FACILITIES.

(a) APPLICATION OF ACT TO FEDERAL GOVERNMENT.—

(1) IN GENERAL.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

(2) APPLICATION OF REQUIREMENTS TO FEDERAL FACILITIES.—All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this Act for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this Act.

(3) EXCEPTIONS.—This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial responsibility. Nothing in this Act shall be construed to require a State to comply with section 104(c)(3) in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

(4) STATE LAWS.—State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

(b) NOTICE.—Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under section 3016 of the Solid Waste Disposal Act (in addition to the information required under section 3016(a)(3) of such Act) information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects contiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.

(c) FEDERAL AGENCY HAZARDOUS WASTE COMPLIANCE DOCKET.—The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this Act with respect to the facility.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act.

(3) Information submitted by the department, agency, or instrumentality under section 103 of this Act.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

(d) ASSESSMENT AND EVALUATION.—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the Administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the docket. Following such preliminary assessment, the Administrator shall, where appropriate—

(1) evaluate such facilities in accordance with the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases; and

(2) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria. Such criteria shall be applied in the same manner as the criteria are applied to facilities which are owned or operated by other persons. Evaluation and listing under this subsection shall be completed not later than 30 months after such date of enactment. Upon the receipt of a petition from the Governor of any State, the Administrator shall make such an evaluation of any facility included in the docket.

(e) REQUIRED ACTION BY DEPARTMENT.—

(1) RIFS.—Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency,